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## THE JURY SYSTEM—DEFECTS AND PROPOSED REMEDIES

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Unlike Mark Antony, if we are to accept the official reports of his speech over the dead body of Cæsar, I come to praise and not to bury our most famous national institution. It has of recent years become popular to pronounce the jury system a failure—a farce—a gamble—a joke. The old negro's description of a court as "a place where they dispenses with justice" is generally accepted as accurate. We hear much more about lawless, conscienceless and foolish juries than about lawless, conscienceless and foolish fathers and brothers, uncles and cousins, bakers, butchers and plumbers—as if a collection of heterogeneous frail humanity should necessarily prove stronger and more intelligent than its component parts. Of recent years everybody has taken a turn at giving the dog a bad name. My remarks are by way of protest.

I was asked to speak upon the jury system and the various proposed remedies for its defects. But its chief defect can only be cured by its entire abolition—the defect of humanity. For of all earthly institutions the jury is the most human—twelve times as human as a single judge—and created for that very reason. If you consider the matter impartially the wonder is not that the jury system is not better, but that it is not worse. How can that extraordinary conglomerate of ignorance, sentiment, prejudice, insanity and anarchy known as the jury be productive of justice? How can the Irishman administer justice to the negro, the Christian to the Jew, the Republican to the Democrat? How can any good thing come out of that sort of a Nazareth? Frankly speaking, how many of you would really care to be judged by any twelve of your own immediate friends? You would be sure to remember that this one had too hot a temper, that one ineradicable bias, that another, was eccentric, that a fourth had an uncle in an insane asylum, and that the rest were a little queer anyway. Yet how vastly preferable they would seem to any jury of your peers which would be drawn

out of the wheel by a clerk of sessions! Still you would probably get justice. I once had a jury composed of four saloon keepers, three delicatessen men, a junk dealer, an impressionist artist, one cab driver, one grave digger and a lecturer on the Holy Land—and it was one of the best juries I ever had. It is stated on good authority that Recorder Smyth, of New York, once said that he had never known a jury over which he was presiding in a criminal case to return a wrong verdict. That is high praise for a system popularly described as a broken-down failure. Why should a jumble of unintelligent Americans of foreign birth, most of them of a rather low personal standard of business morality, render impartial and honest verdicts from a jury box? I answer, for the same reason that the common people of this country have never yet failed to respond to any appeal based on morality or justice. Because with all our failings this nation is essentially a moral nation with high ideals of honor and public duty—often, I regret to say, better exemplified in the humble service of the jurymen than in our legislatures and municipal office holders.

Now, inasmuch as the chief defects of the jury system are inherent in its very nature, it is well to have in mind the purposes for which it was devised. We should remember that the jury was instituted and designed to protect the English freeman from tyranny upon the part of the crown. Judges were, and sometimes still are, the creatures of a ruler or unduly subject to his influence. And that ruler neither was nor is always the head of the nation; but just as in the days of the Normans, he might have been a powerful earl whose influence could make or unmake a judge, so to-day he may be none the less a ruler, if he exists in the person of a political boss who has created the judge before whom his political enemy is to be tried. I have seen more than one judge openly striving to influence a jury to convict or acquit a prisoner at the dictation of such a boss, who, not content to issue his commands from behind the arras, came to the court room and ascended the bench to see that they were obeyed. Usually, the jury indignantly resented such interference and administered a well-merited rebuke by acting directly contrary to the clearly indicated wishes of the judge. Wealth and influence are no less powerful to-day than they were in the days of the barons, and our liberties no less precious. It is frequently said that there is no longer any danger that an innocent man will be convicted, but

that the difficulty now is to prevent the acquittal of the guilty. This is, broadly speaking, true. But a system which would permit the conviction of an innocent man in a civilized country would be intolerable. Yet, without a jury such might easily be the case in any city of the United States.

Imagine the shock to our sense of justice, if Joseph Pulitzer, the proprietor of the *New York World*, could have been extradited to Washington during the last administration and, before a criminal judge, appointed by the Executive, and in the shadow of the White House, tried for a libel upon the President's brother-in-law without a jury. It was to protect themselves against such possibilities that the barons forced King John to acknowledge the right to local courts and jury trial as set forth in Magna Charta. "Common pleas shall not follow the King's court, but be held in some certain places."

"This writ called *Præcipe* shall not in future be issued, so as to cause a freeman to lose his court."

"No freeman shall be taken, imprisoned or disseised or outlawed, or exiled, or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land."

It was precisely this to which the colonists objected in the Declaration of Independence,—“for transporting us beyond seas to be tried for pretended offenses.” And this right has finally been crystallized in our Constitution as follows: “The trial of all crimes except in cases of impeachment shall be by jury, and such trials shall be held in the state where the said crimes shall have been committed.”

The time has not yet come in the United States when our liberties would be safe without the jury.

It is inconceivable that an institution so interwoven with our ideas of popular government should be displaced. Even if there were substituted for it some more accurate method of administering the law in criminal cases, it might well be that what we gained in efficiency we should more than lose in the illustration of the principles of republican government.

#### *The Question of Defects and Proposed Remedies*

Just why there should be so much criticism of the jury I have never been able to understand. Assuming that the system is an

essential element in our form of government, is the jury any less successful than any other of its branches? You do not hear any tirades against the defects of presidents, governors, legislatures or police captains *as a class* or as a feature of our government. They are accepted as necessary evils. There are no societies for the improvement of mayors of cities or the training and discipline of United States senators. We take them as they are, simply because we know that they are human, like the rest of us. Is the justice administered by our juries less admirable than that of chief executives or of local judges or police magistrates? Probably not.

That brings us to the consideration of just what kind of justice is administered by the jury. My opinion, after trying several thousand criminal cases before between 8,000 and 10,000 jurymen, is that the system is in excellent working order. I do not know anything about Philadelphia juries; my experience is limited to New York County and what I have been told about Massachusetts and New Jersey. I dare say that in the country districts juries are more complacent than in the big cities. They are apt to be friends of the man at the bar and more anxious about not hurting his feelings than if he were a stranger. Taken on the average, as all our institutions should be judged, I believe that, whatever the individual faults of jurymen may be, once sworn and in the box, they become a highly conscientious body of men. I do not think that lawlessness is an attribute of American juries as a class any more than it is of judges, presidents or district attorneys.

If, four times out of five, a judge rendered decisions that met with general approval he would probably be accounted a highly satisfactory judge. One cannot be right every time. Now, out of every 100 indicted prisoners brought to the bar for trial, probably fifteen ought to be acquitted if prosecuted impartially and in accordance with the strict rules of evidence. In the year 1908, the last statistics available, the juries of New York County convicted in 68 per cent. of the cases before them. If we are to test fairly the efficiency of the system, we must deduct from the thirty-two acquittals remaining the fifteen acquittals which were justifiable. By so doing we shall find that in the year 1908 the New York County juries did the correct thing in about eighty-three cases out of every hundred. This is a high percentage of efficiency. Is it likely that any judge would have done much better? Is a judge,

devoting his time exclusively to the law, as well qualified to pass on the probabilities of a situation as twelve men of affairs? Or is a single judge less likely to yield to popular clamor than a jury whose identity is lost the moment the trial is over?

Of course, as murder is the most sensational of crimes, it is not surprising that the jury system is usually judged by its effectiveness in that particular class of cases, and it is true that the percentage of convictions is from 15 to 20 per cent. less than in other varieties of crime. The reasons for this, however, are clearly apparent.

*First*, It is much more inherently improbable that a man or a woman is bad enough to kill another than that he or she will accept a bribe or get married too many times.

*Second*, A jury always demands proof almost mathematically convincing before convicting a prisoner of a crime punishable by death, and practically discards the reasonable doubt proposition. There must be *no* doubt in a murder case, whereas they will convict a pickpocket almost on suspicion.

*Third*, The law of self-defense is exceedingly broad, not to say ambiguous, and it is the inevitable plea of the murderer.

*Fourth*, Murder cases attract a far higher degree of ability to their defense; and,

*Fifth*, But first in importance, the chief witness is always absent, having been conveniently removed by the very crime for which his assassin is on trial. Thus we should not expect to convict as often in murder cases as in others.

I believe that the ordinary New York County jury finds a correct general verdict four times out of five. But all juries go wrong occasionally, just as anybody else does. Wilfully, or by mistake, they sometimes render verdicts deeply shocking to our sense of justice. Such performances are widely heralded in the press, for a sentimental acquittal makes a great "copy." But there are many verdicts popularly regarded as examples of lawlessness, which, if examined calmly and solely from the point of view of the evidence, would be found to indicate nothing of the kind, but, on the contrary, to be the reasonable acts of honest and intelligent juries.

One side always gets licked in every lawsuit. There will always be some persons who think that every defendant should be convicted, and feel aggrieved if he is turned out by the jury. Yet they entirely forget in their displeasure at the acquittal of a man

whom they instinctively "*know*" to be guilty, that the jury probably had exactly the same impression, but were obliged, under their oaths to acquit him because of an insufficiency of evidence.

It may be unfortunate that the cases attracting the most attention are not always the strongest, but a sound opinion as to whether the juries in these or any other cases acted reasonably or not would necessitate a complete knowledge of the evidence and of the particular phases of the law applicable to it. About half the public are dissatisfied in any event, no matter whether the defendant be acquitted or convicted. These will always agree that justice has not been done, although 90 per cent. of the most emphatic have only a hazy knowledge that somebody has killed somebody else.

Occasionally, to be sure there occurs a fiasco of justice. But such verdicts are the exception and not the rule, and for every such lawless jury there are a dozen others who obey their oaths and do their duty, however unpleasant it may be. As a matter of record, however, juries usually convict in "star" or celebrated cases. Thus, in the last ten years in New York County, with but two or three exceptions, there has been a constant series of convictions in important trials in which at the time the public was deeply interested.

My own observation leads me to believe that in those parts of this country where the people want an efficient jury system, they get it. To demand a human institution that will always work perfectly would be tantamount to demanding perfect humanity. You will have good governors and all-wise presidents just so long as you want them, and the same is true of the jury. They are all part of what we regard as successful republican government. There is no constructive ingenuity capable of devising a form of government in which only perfect men can be chosen to office. Thus, whatever defects there are reside in the officeholders and not in the office itself.

Now, the jury is here to stay, and, it seems to me, works rather better than could be expected. Of course, it has defects, and some of them could be easily remedied. Many so-called defects are not defects at all. For example, you hear a great deal about the difficulty of compelling intelligent and capable men to serve, and how only the rabble are left upon our juries. Well, I for one, believe more in the honesty and ability of the rabble who are willing to do their

duty than in that of the so-called gentlemen who successfully evade it.

I have no use for the prosperous citizen who is too good for jury duty,—too clean and too comfortable to get down into the jury box with his grocer and his plumber and do some work. I can get along without him entirely. He is the same soft chap that hires another fellow to go to war for him, while he stays at home and makes money out of a government contract. We do not want as jurors the type of men who have so little interest in the community that they do not even vote. I had rather take an immigrant, five years off Ellis Island, who has some pride in being an American, and trust my liberty to him, than to a Fifth Avenue or Walnut Street swell who is bored to death with everything in general, and anything pertaining to politics and government in particular. We can get on without the gentlemen as jurors, if we can get the men. Some of the worst jurors I ever had belonged to my own clubs in New York. The fellows I like to get as jurors are master carpenters, masons, contractors, engineers, who have had experience of real life, are glad to be alive right here in the United States and are interested in the place. If we do not get enough of this type of men on our juries it is probably because we have not enough of them, anyway. There are no laws that will put public spirit into a moral dead beat.

Of course, we should encourage every citizen to do his duty. Service as jurymen should be regarded as an honor and a distinction, not as a curse. We should pay our jurors well for their loss of time. The two main practical objections to the present methods of conducting jury trials seem to me to be the unconscionable delay involved in the selection of talesmen and the fact that unanimity is required. In New York the prisoner can arbitrarily challenge the first twenty talesmen called against him if he is charged with a crime punishable by a term of more than ten years. This number is increased to thirty in murder cases. When the prisoner's lawyer demands an individual examination of talesman the selection of the jury usually takes as long or longer than the actual trial. I will guarantee to delay any serious criminal trial for two whole days selecting a jury,—provided I get a reasonable fee. It is all guesswork anyway. The number of arbitrary challenges should be summarily reduced to from three to six. With a little more care in the orig-



inal selection of our panels there would be slight risk involved to either side in accepting the first twelve men that filed into the box.

As to the number which should be necessary to a verdict, I do not, personally, see why we should demand an unanimous verdict. We do not require it anywhere else. There is to-day no particular sanctity in the number "12," whatever may have been the feeling in ancient times. The reason for having twelve jurymen is conclusively explained, in Duncomb's *Trials per Pais*.

"And first as to their number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason has the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve and Solomon's officers were twelve. Therefore not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law, in the Exchequer chamber, and there are twelve counsellors of State for matters of state; and he that waget his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mis-trial."

Much of the seeming misguidedness of juries in criminal cases is due, just as it is due in civil cases, to the idiosyncrasy, or the avowed purpose to be "agin' the government," of a single talesman. In an ideal community, no matter how many persons constituted the jury, provided the evidence was clear one way or the other, the jury would always agree, since they would all be honest and reasonable men. But just as a certain portion of our population is mentally unbalanced, anarchistic and criminal, so will be a certain portion of our jurors. In addition to these elements, there will almost invariably be found some men upon every panel who are so obstinate, conceited and overbearing as to be totally unfit to serve, either from the point of view of the people or the defense. It is enough for one of these recalcitrant gentlemen that eleven other human beings desire something else. That settles it. They shall go his way, or not at all.

Some allowance should, therefore, be made for the single lunatic or anarchist that gets himself drawn on about every fifth jury, for if he once be empanelled a disagreement will inevitably follow. This could be accomplished by reducing the number necessary for a ver-

dict to eleven. Hundreds of juries have been "hung" by just one man. It would be an excellent thing to have an additional, or thirteenth, juror sworn to take the place of any one of the others who might fall sick or die during the trial. Such reforms as these easily suggest themselves.

But I believe that the way to elevate the jury system is to elevate the bench. With strong and capable men to guide them, juries would rarely go wrong. The chief obstacle to the administration of justice to-day is the interference of the sensational press, which arouses the sympathy and stimulates the imagination of the reader, not only by exaggerated and falsely accentuated accounts of the testimony, however filthy and revolting, but also by running column after column of matter not drawn from the evidence at all, and calculated to inflame the mind of the public and, through it, the jury. In view of this deliberate perversion of truth and morals the euphemisms of a hard-put defendant's counsel when he pictures as scullery maid as an angel, and a coarse bouncer as a St. George, seem innocent indeed. They are, in fact, only rendered possible by the antecedent co-operation of the "sympathy brigade," the "special" writers, and the staff of instructed reporters, who, with one common purpose and in accordance with the policy of their editor or proprietor, blacken or canonize the dead and extol or defame the living.

It is not within the rail of the courtroom, but within the pages of these sensational journals, that justice is made a farce. The phrase, "contempt of court," has ceased practically to have any significance whatever. The front pages teem with caricatures of the judge upon the bench, of the individual jurors with exaggerated heads upon impossible bodies, of the lawyers ranting and bellowing, juxtaposed with sketches of the defendant praying beside his prison cot, or firing the fatal shot in obedience to a message borne by an angel from on high.

Imagine, if you can, a defendant in a murder case reporting his own trial for a daily paper, and giving his own impressions and explanations of the evidence, with the jury at liberty, if they see fit, to read every word! Small wonder that curious and morbid crowds struggle for access to such supposed scenes of mingled hilarity and pathos, or that jurymen are occasionally led to believe that their verdict should be but the echo of "public opinion" as expressed

in the columns of the press. How long would the "unwritten law" play any part in the administration of criminal justice if every paper in the land united in demanding not only in its editorials, but upon its front pages, that private vengeance must cease?

In conclusion, let me revert to my original proposition. The defects of the jury system are the defects of human nature. The stream cannot rise above its source. The jury system works the exact justice which public opinion demands,—no more and no less. As we grow to have a greater respect for human life and a higher regard for law and honesty, the verdicts of our jurors will keep pace with public sentiment. The day will come, in fact it seems to be breaking just about this time, when dishonesty in business and graft in politics will lead to the cropped head and the ball and chain as certainly as burglary and rape. As we grow in age and in grace, juries, like all public officers, will perform their duties conscientiously and accurately; they will uphold the laws, unmoved by prejudice or sympathy, they will be unaffected by popular sentiment or fear of newspaper disapproval; they will be perfect examples of a perfect system of government. But then there will be no need for juries,—for there will, of course, be no criminals.